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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ARTHUR FREDRICK LUTE, III,
12 CDCR #AA-9561,

13 Plaintiff,

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15 vs.
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18 WILLIAM D. GORE, et al.;

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21 Defendants.
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Civil No. 09cv2798 JM (POR)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT [Doc. No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
PURSUANT TO 28 U.S.C. § 1915(e)(1)
[Doc. No. 4]; and**

**(3) DISMISSING COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C. §§ 1915(e)(2)
AND 1915A(b); AND**

24 Arthur Fredrick Lute III ("Plaintiff"), a state prisoner currently incarcerated at the Richard J.
25 Donovan Correctional Facility located in San Diego, California, and proceeding pro se, has submitted
26 a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a Motion to Proceed *In*
27 *Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for
28 Appointment of Counsel [Doc. No. 4].

I.

MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 4]

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff’s request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

II.

MOTION TO PROCEED IFP [Doc. No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From

1 the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average
 2 monthly deposits in the account for the past six months, or (b) the average monthly balance in the
 3 account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
 4 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect
 5 subsequent payments, assessed at 20% of the preceding month's income, in any month in which the
 6 prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is
 7 paid. *See* 28 U.S.C. § 1915(b)(2).

8 The Court finds that Plaintiff has no available funds from which to pay filing fees at this time.
 9 *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing
 10 a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no
 11 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that
 12 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based
 13 solely on a "failure to pay ... due to the lack of funds available to him when payment is ordered.").
 14 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and assesses no initial
 15 partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees
 16 mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment
 17 provisions set forth in 28 U.S.C. § 1915(b)(1).

18 **III.**

19 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

20 Notwithstanding IFP status or the payment of any partial filing fees, the Court must subject each
 21 civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order the sua
 22 sponte dismissal of any case it finds "frivolous, malicious, failing to state a claim upon which relief may
 23 be granted, or seeking monetary relief from a defendant immune from such relief." 28 U.S.C.
 24 § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) ("[T]he provisions of 28 U.S.C.
 25 § 1915(e)(2)(B) are not limited to prisoners."); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 26 (en banc) (noting that 28 U.S.C. § 1915(e) "not only permits but requires" the court to sua sponte
 27 dismiss an *in forma pauperis* complaint that fails to state a claim).

28 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte dismissal

1 of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as amended, 28 U.S.C.
 2 § 1915(e)(2) mandates that the court reviewing an action filed pursuant to the IFP provisions of section
 3 1915 make and rule on its own motion to dismiss before directing the U.S. Marshal to effect service
 4 pursuant to FED.R.CIV.P. 4(c)(3). *See Calhoun*, 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also*
 5 *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir. 1997) (stating that sua sponte screening
 6 pursuant to § 1915 should occur “before service of process is made on the opposing parties”).

7 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 8 allegations of material fact and must construe those facts in the light most favorable to the plaintiff.”
 9 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 10 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews*, 398 F.3d at 1121. In
 11 addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los*
 12 *Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights
 13 cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro
 14 se civil rights complaint, however, the court may not “supply essential elements of claims that were not
 15 initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

16 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting
 17 under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant
 18 of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See*
 19 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122 (2004); *Haygood v. Younger*,
 20 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

21 **A. Rule 8**

22 As a preliminary matter, the Court finds that Plaintiff’s Complaint fails to comply with Rule 8.
 23 Specifically, Rule 8 provides that in order to state a claim for relief in a pleading it must contain “a
 24 short and plain statement of the grounds for the court’s jurisdiction” and “a short and plain statement
 25 of the claim showing that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(1) & (2). Here, Plaintiff
 26 sets forth a list of Defendants but fails to tie any of his factual allegations to any one of the named
 27 Defendants. Plaintiff must clearly identify the alleged constitutional violations that he attributes to each
 28 Defendant and the specific facts that give rise to the alleged violation.

1 **B. Verbal Harassment**

2 Plaintiff alleges that he was “verbally abused and degraded.” (Compl. at 4.) To the extent that
 3 Plaintiff is seeking to hold Defendants liable for harassing him, he has failed to state a claim. Verbal
 4 harassment or verbal abuse by prison officials generally does not constitute a violation of the Eighth
 5 Amendment. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (harassment does not constitute
 6 an Eighth Amendment violation); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987)
 7 (harassment in the form of vulgar language directed at an inmate is not cognizable under § 1983);
 8 *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (verbal threats and name calling are not
 9 actionable under § 1983). Thus, Plaintiff claims regarding verbal harassment are dismissed for failing
 10 to state a claim upon which § 1983 relief can be granted.

11 **C. Fourteenth Amendment Due Process Claims**

12 Plaintiff also alleges that he was denied due process when he was placed in administrative
 13 segregation (“Ad-Seg”) for five days. (*See* Compl. at 5.) “The requirements of procedural due process
 14 apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of
 15 liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison
 16 regulations may grant prisoners liberty interests sufficient to invoke due process protections. *Meachum*
 17 *v. Fano*, 427 U.S. 215, 223-27 (1976). However, the Supreme Court has significantly limited the
 18 instances in which due process can be invoked. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483
 19 (1995), a prisoner can show a liberty interest under the Due Process Clause of the Fourteenth
 20 Amendment only if he alleges a change in confinement that imposes an “atypical and significant
 21 hardship . . . in relation to the ordinary incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v.*
 22 *Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).

23 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution
 24 because he has not alleged, as he must under *Sandin*, facts related to the conditions or consequences of
 25 his placement in Ad-Seg which show “the type of atypical, significant deprivation [that] might
 26 conceivably create a liberty interest.” *Id.* at 486. For example, in *Sandin*, the Supreme Court considered
 27 three factors in determining whether the plaintiff possessed a liberty interest in avoiding disciplinary
 28 segregation: (1) the disciplinary versus discretionary nature of the segregation; (2) the restricted

1 conditions of the prisoner's confinement and whether they amounted to a "major disruption in his
2 environment" when compared to those shared by prisoners in the general population; and (3) the
3 possibility of whether the prisoner's sentence was lengthened by his restricted custody. *Id.* at 486-87.

4 Therefore, to establish a due process violation, Plaintiff must first show the deprivation imposed
5 an atypical and significant hardship on him in relation to the ordinary incidents of prison life. *Sandin*,
6 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the Court could find there were
7 atypical and significant hardships imposed upon him as a result of the Defendants' actions. Plaintiff
8 must allege "a dramatic departure from the basic conditions" of his confinement that would give rise
9 to a liberty interest before he can claim a violation of due process. *Id.* at 485; *see also Keenan v. Hall*,
10 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998). He has not;
11 therefore the Court finds that Plaintiff has failed to allege a liberty interest in remaining free of ad-seg,
12 and thus, has failed to state a due process claim. *See May*, 109 F.3d at 565; *Hewitt*, 459 U.S. at 466;
13 *Sandin*, 515 U.S. at 486 (holding that placing an inmate in administrative segregation for thirty days "did
14 not present the type of atypical, significant deprivation in which a state might conceivably create a
15 liberty interest.").

16 **D. Respondeat Superior**

17 Plaintiff names San Diego Sheriff William Gore as a Defendant in this matter but fails to set
18 forth any factual allegations with regard to Defendant Gore in the body of Plaintiff's Complaint. Thus,
19 it appears that Plaintiff seeks to hold Defendant Gore liable in his supervisory capacity. However,
20 there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433,
21 1437-38 (9th Cir. 1993). Instead, "[t]he inquiry into causation must be individualized and focus on the
22 duties and responsibilities of each individual defendant whose acts or omissions are alleged to have
23 caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*
24 *v. Goode*, 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff must
25 allege personal acts by each individual Defendant which have a direct causal connection to the
26 constitutional violation at issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v.*
27 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

28 Supervisory prison officials may only be held liable for the allegedly unconstitutional violations

1 of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what extent they personally
 2 participated in or directed a subordinate's actions, and (2) in either acting or failing to act, they were an
 3 actual and proximate cause of the deprivation of Plaintiff's constitutional rights. *Johnson v. Duffy*, 588
 4 F.2d 740, 743 (9th Cir. 1978). As currently pleaded, however, Plaintiff's Complaint fails to set forth
 5 facts which might be liberally construed to support an individualized constitutional claim against
 6 Defendant Gore.

7 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim upon
 8 which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C. §§ 1915(e)(2)(b)
 9 & 1915A(b). The Court will provide Plaintiff with an opportunity to amend his pleading to cure the
 10 defects set forth above. Plaintiff is warned that if his amended complaint fails to address the
 11 deficiencies of pleading noted above, it may be dismissed with prejudice and without leave to amend.

12 IV.

13 CONCLUSION AND ORDER

14 Good cause appearing, **IT IS HEREBY ORDERED** that:

15 1. Plaintiff's Motion for Appointment of Counsel [Doc. No. 4] is **DENIED** without
 16 prejudice.

17 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
 18 **GRANTED**.

19 3. The Secretary of California Department of Corrections and Rehabilitation, or his
 20 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in
 21 this case by collecting monthly payments from the account in an amount equal to twenty percent (20%)
 22 of the preceding month's income and forward payments to the Clerk of the Court each time the amount
 23 in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE
 24 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

25 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
 26 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
 27 Sacramento, California 95814.


28 **IT IS FURTHER ORDERED** that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

6. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: January 27, 2010


Hon. Jeffrey T. Miller
United States District Judge